Supreme Court, U.S.
FILED

02-57 MAY 6 2002

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

JAMES KING and OMAH KING,

Petitioners,

v.

MERRILL LYNCH CREDIT CORPORATION; ATLANTIC STEEL CORPORATION; V.I. BUREAU OF INTERNAL REVENUE; BUCCANEER MALL ASSOCIATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 PP

QUESTIONS PRESENTED FOR REVIEW

The District Court and Third Circuit Court of Appeals circumvented the power of the Bankruptcy Court and the protection of the bankruptcy code sought by the Petitioners.

As presented in this brief, the lower courts failed to void an invalid foreclosure and order a creditor to seek relief in the proper forum – the bankruptcy court. The creditor and lower courts circumvented the role of the automatic stay provisions of the bankruptcy code and confirmed a foreclosure proceeding in complete disregard of bankruptcy procedures. Instead, the lower courts decided to usurp the role of the Bankruptcy Court and sua sponte cause a de novo evidentiary review of the purpose of the bankruptcy filing. By failing to treat the Bankruptcy Court's order as collateral estoppel, the District Court violated the Petitioners' due process rights since they infringed upon the latter's property interests without giving proper notice and the opportunity to be heard. The lower courts decision fail to recognize the separation of powers among the judicial system and adopts an overbroad and overreaching jurisdiction for District Courts in clear violation of the federal statutes.

I. WHETHER THE THIRD CIRCUIT COURT OF APPEAL AND THE DISTRICT COURT OF VIRGIN ISLANDS-ST. CROIX VIOLATED THE ENFORCEMENT OF A BANKRUPTCY STAY AND ERRONEOUSLY VALIDATED A FORECLOSURE WITHOUT SEEKING RELIEF FROM THE BANKRUPTCY COURT THEREBY VIOLATING THE PETITIONERS' DUE PROCESS RIGHTS AND THE PROTECTION OF THE BANKRUPTCY CODE?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit dated December 3, 2001 is set forth in the Appendix, p. 1a. The Order of the Appeals Court denying the Petition for Rehearing En Banc is set forth in the Appendix, p. 21a. The decision on the record from the District Court of the Virgin Islands-St. Croix dated January 26, 2001 is set forth in the Appendix, p. 19a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Third Circuit denied the Petitioner's Rehearing En Banc on February 5, 2002. On February 12, 2002, the Petitioner filed a timely Notice of Appeal and this Petition was filed within the appeal period.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

11 U.S.C. Section 362

§ 362. Automatic stay – Bankruptcy Code

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], operates as a stay, applicable to all entities, of–

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor...

(c) Except as provided in subsections (d), (e), and (f) of this section–

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of–

(A) the time the case is closed;...

(B) the time the case is dismissed

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay–

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if–

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period)–

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time;

or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section–

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

28 U.S.C. Section 157(b)
Bankruptcy Judges: Procedures

(1) Bankruptcy Judges may hear and determine all cases...and core proceedings arising under title 11...and may enter appropriate orders and judgments...

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation f claims or interests for the purposes of confirming a plan...

STATEMENT OF THE CASE

James King and Omah King, hereinafter the "Petitioners", were owners of real property known as Parcel Number 12, Estate Frenchman's Bay, Island of St. Thomas, in the United States Virgin Islands (the "Property").

Merrill Lynch was the holder of a first mortgage on the Property. In 1994, Merrill Lynch notified the Petitioners that they were in default on the mortgage. On March 24, 1995, Merrill Lynch filed a Complaint against the Petitioners and Atlantic Steel Corporation, ("ASC"), a joint lienholder on the property, in the District Court of the Virgin Islands-St. Croix. Thereafter, ASC filed a cross-claim against the Petitioners alleging that the latter defaulted on their note and mortgage. Merrill Lynch and the Petitioners settled their dispute and the Complaint was dismissed.

On April 9, 1997, the District Court entered a default judgment against the Petitioners on the cross-claim. On December 1, 1998, the Petitioners entered the United States Bankruptcy Code in the Eastern District of Virginia Alexandria Division at 9:00 a.m. and filed for Chapter 13 Bankruptcy at or before 9:10 a.m. ASC's attorney was immediately notified of the filing by the Petitioners, the Bankruptcy Court and the Petitioners' local attorney.1 The Petitioners' local attorney attempted to make restitution. On the same day, after the bankruptcy petition was filed and after ASC's attorney was notified, the United States Marshal held a foreclosure sale of the Property and Albert George was the successful bidder.

On December 8th, the Petitioners filed notice in the District Court of the Virginia Bankruptcy. On December 18th, ASC filed a notice of satisfaction and release of judgment in the District Court. The District Court confirmed the foreclosure sale by Order dated January 7, 1999. The proceeds of the sale were released on January 11, 1999.

The Chapter 13 Bankruptcy was ultimately dismissed

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1 In fact, ASC's attorney was notified that the Chapter 13 Petition was going to be filed prior to December 1, 1998.

on March 5, 1999. On April 22, 1999, the Petitioners filed an emergency motion in the District Court to vacate the foreclosure sale and void all subsequent orders; ASC and Albert George opposed the motion. On July 1, 1999, the District Court ordered the Petitioners to supply the Court with a certified copy of the bankruptcy docket and show cause why the court should not "annul" the automatic stay of the bankruptcy proceedings. On July 15th, the Petitioners filed a motion for reconsideration seeking a finding that the foreclosure sale was completed after the filing of the bankruptcy petition.

The District Court agreed that it lacked jurisdiction to annul the bankruptcy petition but refused to grant relief on the issue of the precise timing of the foreclosure sale. The District Court found that the foreclosure sale was completed before 10:10 atlantic standard time – before 9:10 eastern standard time, when the bankruptcy petition was filed in Virginia. The District Court and six officers who were present at the foreclosure entered the time as 10:30 a.m., well after the bankruptcy filing.

On June 12, 2000, the District Court found that the foreclosure sale was "valid". The Petitioners then requested to vacate the foreclosure sale based on the fact that the bankruptcy preceeded the sale. On January 26, 2001, the District Court affirmed its previous decision that the foreclosure sale was completed prior to the filing of the bankruptcy petition.

The Petitioners filed a Notice of Appeal to the Third Circuit Court of Appeals. On December 27, 2001, the Circuit Court affirmed the District Court's decision. The Petitioners filed a Petition for Rehearing En Banc which was denied on February 5, 2002. As a result, on February 12, 2002, the Petitioners filed a Notice of Appeal to the United States Supreme Court.

The Petitioners respectfully request that this Honorable Court grant this writ for certiorari, reverse the lower court's opinion since the evidence supports the Petitioners' contentions that their bankruptcy preceeded the foreclosure sale and therefore the sale was void. The lower

courts' decisions failed to recognize the power of the bankruptcy petition above the District Court's jurisdiction.

ARGUMENT

I. THE THIRD CIRCUIT COURT OF APPEALS AND THE DISTRICT COURT OF VIRGIN ISLANDS-ST. CROIX VIOLATED THE ENFORCEMENT OF A BANKRUPTCY STAY AND ERRONEOUSLY VALIDATED A FORECLOSURE WITHOUT SEEKING RELIEF FROM THE BANKRUPTCY COURT THEREBY VIOLATING THE PETITIONERS' DUE PROCESS RIGHTS AND THE PROTECTION OF THE BANKRUPTCY CODE.

The Petitioners sought protection under Chapter 13 of the Bankruptcy Code which provides a procedure for eligible individuals with regular income to pay their debts in full or to effect a composition. *Casse v. Key Bank Nat'l Ass'n*, 198 F.3d 327 (1999). Section 362(a)(e) of the Bankruptcy Code provides that a petition filed in bankruptcy "operates as a stay, applicable to all entities, of...any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. Section 362 (a)(e). In *In Re Eugene L. Pieper, P.C.*, 202 B.R. 294, 297 (Bankr.D.Neb. 1996), the bankruptcy court opined that "the automatic stay is broad in scope and applies to almost every formal and informal action against the debtor or property of the debtor." *Citing*, Lawrence P. King., et.al., Collier on Bankruptcy p. 362.04, at 362-34 (15th ed. 1996). The purpose of the automatic stay is to give the debtor a breathing spell from his creditors in which he may attempt a repayment or reorganization plan...The automatic stay also protects creditors by averting a scramble for the debtor's assets and promoting instead an orderly liquidation procedure under which all creditors are treated equally. *Farley v. Henson*, 2 F.3d 273, 274 (8th Cir. 1993). The District Court violated the underlying purpose of the automatic stay because the overwhelming competent evidence provided by officers and

court officials prove that the foreclosure was completed at 10:30 a.m., well after the filing of the bankruptcy petition and that ASC's attorney knew before the foreclosure that the petition was being filed.

The automatic bankruptcy stay springs into effect upon the filing of a bankruptcy petition. The stay effectively suspends all collection efforts, including foreclosures, giving the debtor breathing room. *Jamo v. Katahdin Fed. Credit Union*, 283 F.3d 392 (2002). 11 U.S.C. Section 362(a) of the Bankruptcy Code provides an automatic stay of certain actions upon the filing of a bankruptcy proceeding. The automatic bankruptcy stay remains in effect unless and until a federal court either disposes of the underlying case, 11 U.S.C. Section 362(c), or grants relief to a particular creditor, 11 U.S.C.S. Section 362(d)-(f). The Bankruptcy Court's jurisdiction is paramount and exclusive. *See Benton v. Callaway*, 336 U.S. 132 (1948); *Brown v. Gerdes*, 321 U.S. 178 (1944).

In the Third Circuit, acts in violation of the stay are voidable. *Constitution Bank v. Tubbs*, 68 F.3d 685, 692 n.3 (3rd Cir. 1995); *In re Shah*, 2001 Bankr. LEXIS 380. However, The District Court sua sponte vacated the automatic stay of the bankruptcy code, even though there was no motion for relief from stay that was filed by ASC thereby violating the Bankruptcy Court's exclusive jurisdiction. The only evidence that the lower courts relied upon was the biased opinion of the bidder that the foreclosure was held "promptly" at 10:00 a.m. and that the "sale was completed in a few minutes". The letter, that was not introduced into evidence by way of pleading or other legal document, is insufficient to prove that the foreclosure was completed prior to the filing of bankruptcy. The incompetent evidence was never cross-examined by the Petitioners. Any evidence submitted by ASC showed that the foreclosure was concluded between 10:02 a.m. and 10:12 a.m. – which is after the time the bankruptcy petition was filed.

The District Court further requested that the Petitioners forward a certified copy of the bankruptcy docket and show cause why the bankruptcy was not filed in bad faith,

even though any allegation of bad faith must be proven by ASC. In fact, given that ASC had notice of the petition filing, they acted in bad faith in proceeding with the foreclosure. If there was an allegation of bad faith, then ASC should have filed a Motion to Dismiss in the Virginia Bankruptcy Court. Whether a bankruptcy petition was filed in bad faith is a question of fact. *In re Keller*, 1996 U.S.Dist. LEXIS 15153. If the Bankruptcy Court believed that the petition was filed in bad faith, then it would have imposed a sanction against the Petitioners, which it did not do so. 11 U.S.C.S. Section 349. However, ASC never disputed that the bankruptcy filing occurred prior to the foreclosure sale, so they could not file a motion in the bankruptcy court. Moreover, the Petitioners requested an evidentiary hearing to prove that ASC had notice of the bankruptcy filing and that ASC acted in bad faith during the foreclosure by bribing other bidders. However, the Petitioners were prevented from introducing such evidence and thus they were deprived of their due process rights of protecting their property interest. The District Court sua sponte allowed the foreclosure sale to be valid in spite of ASC's failure to comply with the bankruptcy code in seeking a relief of stay and/or failing to prove that the bankruptcy petition was filed in bad faith. The District Court lacked jurisdiction to void a bankruptcy stay and validate a foreclosure sale. The District Court was bound by the rulings of the Virginia Bankruptcy Court. *Katchen v. Lendy*, 382 U.S. 323, 334 (1966) ("The normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts.") The only court to have jurisdiction over the Bankruptcy Court's decision was the Third Circuit Court of Appeals. 28 U.S.C. Section 157(b). Of course, ASC never sought the proper legal channels to dispute the Bankruptcy Court's orders. The District Court infringed upon the exclusive jurisdiction of the Bankruptcy Court thereby diminishing its role and power in conflict with the constitution and statutes.

A cornerstone of any meaningful regime of private property is the recognition that the right to use property is an inherent attribute of ownership.. *See, e.g.*, Robert Nozick:

Anarchy, State and Utopia 171 (1974) ("the central core of the notion of a property right...is the right to determine what shall be done with it"); *United States v. Causby*, 328 U.S. 256, 261 (1946). ASC and the District Court infringed upon the Petitioners' inherent right.

Furthermore, the Due Process Clause of the Fourteenth Amendment requires that a State prior to taking an action affecting an interest in property, provide notice that is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of that action. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Supreme Court's Construction of Due Process: 77 L.Ed.2d. 1485 (1999). In *Mullane*, the Supreme Court stated that the fundamental right protected by the due process clause is the right to adequate notice and an opportunity to be heard before any state action depriving one of life, liberty or property is accorded finality. Adequate notice ensures the opportunity to be heard. Thus, *Mullane* established that state action affecting property must generally be accompanied by notification of that action. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 1344 (1988). The Petitioners' due process rights were blatantly violated since they sought protection from the Virginia Bankruptcy Court to stay any foreclosure sale and the District Court's affirmance of the foreclosure is a violation of the constitution since their property interests were infringed upon without notice. The Property was wrongfully undersold; its value exceeded $450,000.00. But even though there was notice to ASC, the legal process was abused and the Petitioners were deprived of due process, starting from notice to coercion at the sale to unacceptable evidence. Even though ASC claimed that the foreclosure occurred by 10:10 a.m., the court and officers entered the time as 10:30 a.m. Therefore, the Petitioners were swiped of their Property due to the bad faith acts of ASC and the District Court's disregard of the bankruptcy code.

The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower courts misapplied those basic constitutional concepts – the Petitioners were not given a reasonable opportunity to protect their property from an arbitrary or unjust appropriation. Instead, the District Court placed a heavy and erroneous burden upon the Petitioners to prove that the bankruptcy was not filed in bad faith and to file the entire bankruptcy in the District Court for a de novo review. The District Court does not have jurisdiction to review the Bankruptcy Court's orders and dockets.

CONCLUSION

The United States Court of Appeals and the District Court of the Virgin Islands-St. Croix violated the Petitioners' due process rights since they confirmed a void foreclosure by failing to recognize the filing of a bankruptcy petition thereby usurping the role of the Bankruptcy Court and the protection of the bankruptcy code.

The Court should grant *certiorari* to review this important matter, order that the bankruptcy court stayed the foreclosure and thus the sale was void, confirm that the Petitioners have a constitutional right to defend their property interests and the District Court infringed upon those rights by failing to recognize the bankruptcy statutes. The District Court impeded upon the jurisdiction of the Bankruptcy Court.

Respectfully submitted,

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(Any footnotes trail the end of each document.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-2321 and 01-1352

MERRILL LYNCH CREDIT CORPORATION

v.

JAMES KING; OMAH KING; ATLANTIC STEEL CORPORATION; V.I. BUREAU OF INTERNAL REVENUE; BUCCANEER MALL ASSOCIATES, INC.

James King; Omah King,

Appellants

On Appeal from the District Court
of the Virgin Islands - St. Croix
(D.C. Civil No. 95-cv-00053)
District Judge: Hon. Thomas K. Moore, District Judge

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 3, 2001

BEFORE: BECKER, Chief Judge, NYGAARD and COWEN, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands - St. Croix and was submitted on December 3, 2001. On consideration whereof, it is now here ordered and adjudged that the Orders of the District Court entered on June 12, 2000 and January 26, 2001, are hereby affirmed. All of the above in accordance with the opinion this of Court. Costs taxed against appellants.

ATTEST: Clerk
Dated: 27 December 2001

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-2321 and 01-1352

MERRILL LYNCH CREDIT CORPORATION

v.

JAMES KING; OMAH KING; ATLANTIC STEEL CORPORATION; V.I. BUREAU OF INTERNAL REVENUE; BUCCANEER MALL ASSOCIATES, INC.

James King; Omah King,

Appellants

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District Judge: Hon. Thomas K. Moore, District Judge

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 3, 2001

BEFORE: BECKER, Chief Judge, NYGAARD and COWEN, Circuit Judges

(Filed: December 27, 2001)

MEMORANDUM OPINION

COWEN, Circuit Judge.

In this appeal we are called upon to review an Order of the District Court of the Virgin Islands which made a factual finding as to the precise timing of a foreclosure sale. The pro se Appellants, James and Omah King, appeal from the Order,

which denied the Kings' request to vacate the foreclosure sale. Because we perceive no reversible error in the factual findings of the District Court as to the exact time of the sale, we will affirm.

I.

The procedural history of this case is quite complex and involves numerous orders and motions in both the District Court and the Bankruptcy Court for the Eastern District of Virginia, Alexandria Division. A good deal of the procedural backdrop involves matters not relevant to the narrow issue presented for our review. The essential factual background to the case, however, is as follows. The Kings were owners of real property known as parcel number 12, Estate Frenchman's Bay on the island of St. Thomas, United States Virgin Islands. Merrill Lynch Credit Corp ("Merrill Lynch") held a note and first mortgage on the property. In or around 1994, Merrill Lynch notified the Kings that they were in default. On March 24, 1995, Merrill Lynch filed a Complaint against the Kings, later amending the Complaint to join Atlantic Steel Corporation ("ASC"), a junior lienholder on the property. ASC then filed a cross-claim against the Kings on the basis that the Kings defaulted on their note and mortgage with ASC. Merrill Lynch eventually resolved the matter with the Kings and moved to dismiss the Complaint. That Motion to Dismiss was granted, and the litigation proceeded between the Kings and ASC.

On April 9, 1997, the District Court entered a default judgment against the Kings on ASC's cross-claim. The United States Marshal held a foreclosure sale of the property on December 1, 1998. Albert George was the successful bidder. That same day, at 9:10 a.m., Eastern Standard Time ("EST"), James King filed a voluntary petition for relief under Chapter 13 of the United States Bankruptcy Code in the Eastern District of Virginia, Alexandria Division. King admitted to commencing the bankruptcy in order to prevent the foreclosure sale. The bankruptcy petition was ultimately dismissed by the Virginia Bankruptcy Court on March 5, 1999.

On December 8, 1998, King filed a suggestion of bankruptcy in District Court, indicating that he had filed a pro se bankruptcy petition in Virginia on December 1, 1998. On December 18, 1998, ASC filed a notice of satisfaction and release of judgment in the District Court. The District Court confirmed the foreclosure sale by Order entered on January 7, 1999. The proceeds from the sale were released soon after, by District Court Order entered on January 11, 1999.

On April 22, 1999, King filed an emergency motion in District Court to vacate the foreclosure sale and all subsequent orders. ASC and Albert George opposed the Motion to Vacate. On July 1, 1999, the District Court ordered King to supply the Court with a certified copy of the docket and pleadings/orders contained in the Bankruptcy Court record. The Court also ordered King to show cause why the District Court should not "annul" the automatic stay of proceedings effected by the bankruptcy filing.n1 On July 15, 1999, King moved to reconsider the July 1, 1999 Order and on July 23, King responded to the July 1, 1999 Order. King requested that the District Court, inter alia, reconsider its "tentative" finding of fact that the foreclosure sale was completed before King filed the bankruptcy petition.

In a Memorandum Opinion addressing King's emergency motion, the District Court agreed with King's position that it was without judicial authority to annul the bankruptcy stay, but refused to grant relief on the issue of the precise timing of the foreclosure sale. The District Court found, as a purely factual matter, that the foreclosure sale was completed before 10:10 a.m., Atlantic Standard Time ("AST") (i.e., before 9:10 a.m., EST—when the Chapter 13 petition was filed in Virginia). It based this finding of fact on affidavits submitted by various individuals involved in the litigation. Having occurred at a point in time before the bankruptcy petition was filed, the Court held that the foreclosure sale was "valid." An Order memorializing this finding was entered by the District Court on June 12, 2000.

King then moved again in the District Court to vacate the foreclosure sale, apparently requesting it to reconsider the factual finding that the foreclosure sale preceded the bankruptcy petition. By Order entered January 26, 2001, the District Court denied this Motion, concluding in a short Memorandum Opinion that no new evidence had been presented to alter its original findings. The Kings now appeal to this Court.

II.

In their briefs, the Kings present one point of error. They assert that the District Court's finding that the foreclosure sale preceded the bankruptcy filing was "clearly erroneous." More specifically, the Kings argue that the Orders of the District Court of January 7 and 11, 1999 (regarding confirmation of sale and release of proceeds) state that the foreclosure sale took place at "10:30 a.m." AST. The Kings further posit that the District Court could not properly rely on the affidavits submitted to establish the precise time line of events because those affidavits were filed by parties interested in the outcome of the case. The Kings also protest that the apparent contradiction between the District Court's two Orders in January 1999 (which state that the sale took place at 10:30 a.m., AST) and the affidavits of the interested parties (which place the sale before 10:10 a.m., AST) has "never been explained."n2

We have reviewed the Kings' Briefs and the Orders below and conclude that no reversible error has occurred. As this case involves a question of fact (i.e., the exact timing of the foreclosure sale), our analysis is constrained by a well-settled standard of review. Specifically, we will only disturb a factual finding of the District Court if that finding is "clearly erroneous." Epstein Family Partnership v. KMART Corp., 13 F.3d 762, 765-66 (3d Cir. 1994); Fed. R. Civ. P. 52.

This standard of review mandates a certain degree of deference to the lower court. An appellate tribunal will reverse a finding of fact by the District Court "most reluctantly and only when well persuaded." See Steven Alan

Childress and Martha S. Davis, 1 Federal Standards of Review § 2.04 (3d ed. 1999) (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 433 (2d Cir. 1945) (emphasis added)). Stated another way, if there are two reasonable ways to view the evidence, a trial judge will not be overturned for choosing one of them. Such a choice is not—by definition—"clearly erroneous." See Federal Standards of Review, § 2.05 (citing United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S. Ct. 177 (1949)); Chaney v. City of Galveston, 368 F.2d 774, 776 (5th Cir. 1966). In a similar vein, we have previously explained that factual findings will not be overturned unless "completely devoid" of credible evidence. American Home Prods. Corp. v. Barr Labs., Inc., 834 F.2d 368, 371 (3d Cir. 1987).n3 Thus, we will not interfere with a factual finding just because we may have decided the matter differently in the first instance. This same level of deference is accorded the District Court's determinations on issues of credibility. See Anderson v. City of Bessemer, 470 U.S. 564, 573, 105 5. Ct. 1504, 1511-12 (1985).

Applying these principles to the case at bar, we cannot conclude that the District Court's finding on the timing of the foreclosure sale was "clear error" or "devoid of credible evidence." The Court had before it several affidavits which—although derived from parties connected to the case—provided the Court with a sufficient evidentiary basis that the sale took place prior to 10:10 a.m., AST. The Kings have not met their burden of persuading us to the contrary. For the foregoing reasons, the District Court's Orders of June 12, 2000 and January 26, 2001 will be affirmed.

TO THE CLERK:
Please file the foregoing opinion.

United States Circuit Judge

Footnotes

1 See 11 U.S.C. § 362(a) (providing for an automatic stay of certain actions upon the filing of a bankruptcy petition).

2 Respondent did not enter an appearance in this appeal.

3 The "clearly erroneous" standard also applies to documentary forms of evidence. Anderson v. City of Bessemer, 470 U.S. 564, 574, 105 5. Ct. 1504, 1511-12 (1985).

FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

MERRILL LYNCH CREDIT CORP.

Plaintiff,

v.

JANES KING AND OMAH KING,
ATLANTIC STEEL CORP.
V.I. BUREAU OF INTERNAL REVENUE,
BUCCANEER MALL ASSOC., INC.

Defendants.

ATLANTIC STEEL CORP.,

Cross-claimant,

v.

JAMES KING AND OMAH KING,
BUCCANEER MALL ASSOC., INC.,

Cross-defendants.

D.C. Civ. No. 1995-053

MOORE, J.

June 12, 2000

MEMORANDUM

Pending before the Court are defendant James King's emergency motion to vacate the foreclosure sale and subsequent court orders ["Emergency Motion to Vacate"],

emergency motion for sanctions against Eddy Rivera, Esq., and Atlantic Steel Corporation ["Emergency Motion for Sanctions"], and motion to reconsider this Court's July 1, 1999 order that Mr. King supplement the record and show cause why this Court should not annul his bankruptcy stay ["Motion to Reconsider"] . The Court will deny in part and grant in part King's Emergency Motion to Vacate, deny without prejudice his Emergency Motion for Sanctions, and deny his Motion to Reconsider.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendants James King ["King"] and Omah King [collectively the "Kings"] were the owners of real property known as Parcel No. 12, Estate Frenchman's Bay [the "property"] . Sometime in 1994, Merrill Lynch Credit Corp. ["Merrill Lynch"], the holder of a note and first priority mortgage on the property, notified the Kings that they were in default. On March 24, 1995, Merrill Lynch filed its first complaint against the Kings. It later amended its complaint to join, as defendants, the junior lienholders, including Atlantic Steel Corporation ["ASC"] . ASC filed a cross-claim against the Kings on September 23, 1996, alleging that the Kings defaulted on their note and mortgage with ASC. Subsequently, on February 18, 1997, Merrill Lynch resolved its dispute with the Kings and moved to dismiss its complaint. The Court granted Merrill Lynch's motion and dismissed its case against the Kings and the other defendants. This left ASC's cross—claim against the Kings.

On April 9, 1997, this Court entered a default judgment against the Kings in favor of ASC. The United States Marshal held a foreclosure sale of the property on December 1, 1998, which began between 10:00 and 10:02 a.m. Atlantic Standard Time ["AST"] and ended before 10:10 a.m. AST.n1 Buyer—intervenor Albert George ["George"] was the successful bidder.

That same day at 9:10 a.m. Eastern Standard Time ["EST"], which was 10:10 a.m. AST, King filed a voluntary

petition for relief under Chapter 13 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Virginia, Alexandria Division (Case No. 98-18517—SSM) . King concedes that he made the "emergency filing" to stay the foreclosure sale that was scheduled that same day. King's bankruptcy petition, however, failed to include a complete list of creditors and assets, as required by law. As a result, the Office of the United States Trustee investigated whether King had left information out of his petition in bad faith. King denied there was any bad faith, and in turn blamed the Maryland attorney who filed the petition for the omissions, even though the petition showed that King filed the petition himself, without an attorney.

On February 18, 1999, the chapter 13 trustee filed a motion to dismiss the petition because of unreasonable delay by King, which was prejudicial to the rights of creditors under 11 U.S.C. § 1307(c) (1). The trustee also objected to Kings' Chapter 13 plan because it failed the liquidation test of 11 U.S.C. §1325(a) (4). King responded on February 26th by filing his own motion to voluntarily dismiss the case under section 1307 (b) The bankruptcy judge dismissed King's case on March 5, 1999.

On March 10, the United States Trustee moved to vacate the order of dismissal for the limited purpose of adjudicating the trustee's March 5 motion alleging concealed assets, failure to list creditors, and false assertion of venue. The bankruptcy court held evidentiary hearings on April 13 and May 17, 1999, to determine whether King filed the bankruptcy petition in bad faith. In its May 18th order, the bankruptcy court, without entering an explicit finding of bad faith, amended its March 5th dismissal and extending to two years the period during which King could not file another bankruptcy petition.n2 The Court premised its order on "the reasons stated orally on the record" the previous day, which included that "it [was] perfectly clear that Mr. King did not take this bankruptcy, Chapter 13 filing very seriously or treated it as anything other than apparently the cheapest injunction in town." (May 17, 1999, Tr. 52.)

Returning to this case, King filed a suggestion of bankruptcy in this Court on December 8, 1998, indicating that he had filed pro se for chapter 13 bankruptcy in the United States Bankruptcy Court, Eastern District of Virginia on December 1, the day of the foreclosure sale. On December 18th, ASC filed notice of satisfaction and release of judgment, and on January 7, 1999, this Court confirmed the sale, and four days later the proceeds from the sale were released.

On April 22, 1999, King filed his Emergency Motion to Vacate the foreclosure sale and subsequent court orders, and on June 21st, he filed his Emergency Motion for Sanctions against Eddy Rivera, Esq., and ASC. Both George and ASC opposed the Emergency Motion to Vacate. On July 1, 1999, this Court ordered that King supply the Court with a certified copy of the docket and all pleadings and orders contained in the record of his petition before the Virginia Bankruptcy Court and show cause why this Court should not annul the automatic stay of proceedings based on his filing bankruptcy in bad faith [the "July 1st Order"] . On July 15th, King moved to reconsider the July 1st Order, and on July 23rd filed a response to the July 1st Order. ASC replied, and King filed a sur—reply. George replied to King's response and sur—reply on December 1, 1999.

II. DISCUSSION

A. Motion to Reconsider

King moves the Court to reconsider its tentative finding that the foreclosure sale preceded the bankruptcy filing, and its order that King produce the bankruptcy file of the Virginia bankruptcy court and show cause why this Court should not annul the stay based on his bad faith filing. The Court agrees with King that it lacks authority to annul the bankruptcy stay. Otherwise, the Court will deny King's motion as failing to show a manifest error or introduce new evidence regarding the timing of the bankruptcy filing and foreclosure sale, and as moot in all other respects.

1. Foreclosure Sale Was Completed Before Filing of Bankruptcy Petition

King has failed to show that the Court committed a manifest error in tentatively finding that the foreclosure sale preceded the bankruptcy filing, and has introduced no newly discovered evidence to prove the same. The Court therefore will not disturb its tentative finding, "based on the filings and evidence before the Court" on July 1st, that the foreclosure sale preceded the bankruptcy filing. See Bluebeard's Castle, Inc. v. Delmar Mktg., Inc., 32 V.I. 278, 284, 886 F. Supp. 1204 (D.V.I. 1995) ("A motion for reconsideration serves to 'correct manifest errors of law or fact or to present newly discovered evidence. '") (quoting Harsco v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985))

In contesting King's motion, ASC has submitted the only new evidence, in the form of filed affidavits, which buttress this Court's tentative finding of fact. The affidavits of Albert George, Alberto Cortes—Dapena, and Eddy Rivera all indicate that the foreclosure sale was completed before 10:10 a.m. AST, and therefore before the bankruptcy filing in Virginia. The affidavit of Alberto Cortez puts the completion of the sale at around 10:07, but no later than 10:10. The affidavit of Albert George puts the completion of the sale at around 10:03 to 10:05, plus about two minutes for clerical matters not part of the sale. The affidavit of Eddy Rivera puts the completion of the sale sometime between 10:07 and 10:12. Therefore, the sale was completed between 10:03 to 10:12 a.m. Further, because the 10:12 estimate includes clerical duties which took a couple of minutes to complete and were not part of the sale itself, the Court finds that the sale was completed before 10:10 a.m. The Court thus holds that the foreclosure sale of the property was valid, having occurred before King filed his bankruptcy petition in Virginia.

2. This Court Cannot Annul the Automatic Stay

King's protest that he should not have to supply this Court with a copy of the Virginia bankruptcy file is moot,

since he has already submitted it. Further, this Court has no jurisdiction to annul the stay, which moots any inquiry into whether the filing was in bad faith.

"The District Court of the Virgin Islands shall have the jurisdiction . . . of a bankruptcy court of the United States" under the Revised Organic Act of 1954, § 22(a), 48 U.S.C. §1612.n3 This jurisdiction does not, however, give this Court the authority to annul the automatic stay in a chapter 11 proceeding filed in the Virginia bankruptcy court. Rather, this Court is bound by the rulings of the Virginia bankruptcy judge. See Katchen v. Landy, 382 U.S. 323, 334 (1966) ("The normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts."). This is especially true where the matter involves a "core bankruptcy" proceeding.n4 Annulling an automatic stay is one such core bankruptcy proceeding. See 28 U.S.C. § 157 (b) (2) (G) ("Core proceedings include . . . motions to terminate, annul, or modify the automatic stay. "). Accordingly, this Court does not have any authority to annul the stay which issued out of the Virginia bankruptcy proceedings.n5

B. Emergency Motion for Sanctions

The same reasoning requires this Court to abstain from considering sanctions based on an alleged violation of the automatic stay stemming from the proceedings in Virginia. A motion for sanctions under 11 U.S.C. 362(h) properly belongs before the court that imposed the bankruptcy stay. See Price v. Rochford, 947, F.2d 829, 832 n.1 (7th Cir. 1991) ("A claim for damages under section 362(h) should probably have been referred to the bankruptcy court under [local rules and] as a 'core' proceeding . . . .") (citations omitted); In re Shmuel Klein, 226 B.R. 542, 544 (Bankr. D.N.J. 1998) (motion seeking actual and punitive damages for willful violation of automatic stay pursuant to section 362(h) of the Bankruptcy Code is core proceeding pursuant to 28 U.S.C. § 157(b) (2)(G)).

C. Emergency Motion to Vacate

Since the foreclosure sale preceded the filing of the bankruptcy petition, the Court must deny King's motion to vacate the foreclosure sale. The Court will vacate the later orders entered during the period of the automatic stay, however, because an action to confirm the sale falls under those actions prohibited by 11 U.S.C. § 362(a).n6 See, e.g., In re Russell Corp., 156 B.R. 347, 350 (Bankr. N.D. Ga. 1993) (action to confirm foreclosure sale falls under actions prohibited by section 362(a)); United States v. Molitor, 157 B.R. 427, 429 (W.D. Wis. 1992) (relief from automatic stay is prerequisite to proceeding with hearing on confirmation of foreclosure sale) . As of 10:10 a.m. AST on December 1, 1998, when King filed his bankruptcy petition, the automatic stay went into effect. It remained in effect until the petition was dismissed on March 3, 1999. Accordingly, ASC's motion for an order confirming the foreclosure sale filed and docketed December 13, 1998, and the Court's order confirming the sale filed January 7, 1999 and docketed January 11, 1999, were barred by the stay and, therefore, void ab initio. See In re Graves, 33 F.3d 242, 247-48 (3d Cir. 1994); Maritime Electric Co. v. United Jersey Bank, 959 F.2d 1194, 1206 (3d Cir. 1991); In re Ward, 837 F.2d 124, 126 (3d Cir. 1988) n7 The Court will vacate its order confirming the sale. For similar reasons, the Court will also vacate its order releasing the proceeds of the sale.n8

III. CONCLUSION

The Court finds it has no jurisdiction to annul the stay of the United States Bankruptcy Court for the Eastern District of Virginia, and will deny the motion to reconsider in all other respects. The Court will deny King's motion to vacate the foreclosure sale, since it preceded the filing of the bankruptcy petition. The Court, however, will vacate the orders confirming the sale and releasing the proceeds, because they were entered during the time the automatic stay was in effect. The Court will deny King's motion for sanctions.

ENTERED this 12th day of June, 2000
For the Court

Thomas K. Moore
District Judge

Footnotes

1 Virginia falls within Eastern Standard Time. The Virgin Islands is located within the Atlantic Standard Time Zone.

2 Ordinarily, under 11 U.S.C. 109(g) (2), a debtor who requested and obtained the voluntary dismissal of a title 11 case following the filing of a request for relief from the automatic stay is barred from re—filing bankruptcy for only 180 days. Here, the bankruptcy judge went out of his way to bar King from invoking further bankruptcy protection for two years.

3 The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§1541-1645 (1994), reprinted in V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 73—177 (1995 & Supp. 2000) (preceding Title One of the Virgin Islands Code).

4 "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . ." 28 U.S.C. § 157(b) (1). In a core case, a bankruptcy court can enter a final judgment over which a District Court for the same district can exercise only appellate review. See 28 U.S.C. §5 157(b) (1), 158(a) (emphasis added).

5 Bad faith in filing a bankruptcy petition would be "cause" to annul the stay under § 362(d) (1). See 28 U.S.C. § 362(d) (1) ("On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . . for cause."). This question is moot, however, since this Court has

no jurisdiction to grant the relief requested. Moreover, the Virginia bankruptcy court has already adjudicated this matter, the result of which was the dismissal of this case without an explicit finding of bad faith. Matters relating to a finding of bad faith or annulling the stay directly implicate title 11, and thus more properly belong before the bankruptcy court which heard Mr. King's petition.

6 Section 362(a) provides, in part, that the filing of a bankruptcy petition acts as a stay of

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

7 ASC's reliance upon In re Siciliano, 13 F.3d 748 (3d Cir. 1994), for the proposition that this Court's order confirming the sale is merely voidable, not void ab initio, is misplaced. The issue in Siciliano was whether the bankruptcy court could even entertain a creditor's motion for relief from the automatic stay filed during the pendency of the stay. The Court of Appeals answered in the affirmative and reversed the bankruptcy court's dismissal of the motion, because the motion was a "request" brought under one of the narrow exceptions in 11 U.S.C. § 362(d) by which creditors can request that the court annul or otherwise modify a stay. By contrast, ASC has made no request to annul or otherwise modify the stay, ASC has stated no authority by which this court could annul or modify a stay imposed by another court, and ASC has not shown (and there is no indication of) how one of the exceptions listed in § 362(d) would apply to this

matter. Finally, the voided actions in the instant case are a motion and an order confirming sale, not a "request" of the sort allowed as an exception under § 362(d).

8 At first blush, vacating the confirmation of sale and the release of the proceeds appears futile, since, given that the automatic stay is no longer in force, all a party would have to do is re-file a motion to confirm the foreclosure sale. Voiding the confirmation of sale and confirming the sale anew, however, affects King's substantive rights, as it will "reset" the six—month redemption period. Protecting such substantive interests in property is the primary purpose of the automatic stay provision under title 11.

9 Further, George's concern that he be reimbursed for taxes he has already paid on the property may be alleviated under 28 V.I.C. § 535, which states that the redeeming party must not only pay "the amount of the purchase money," but also "interest at the legal rate per annum thereon from the date of sale, together with the amount of any taxes which the purchaser may have paid thereon after purchase."

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

MERRILL LYNCH CREDIT CORP.,

Plaintiff,

v.

JAMES KING and OMAH KING, ATLANTIC STEEL CORP., and VIRGIN ISLANDS BUREAU OF INTERNAL REVENUE,

Defendants.

ATLANTIC STEEL CORP.,

Cross-Claimant,

JAMES KING and OMAH KING,
BUCCANEER MALL ASSOC., INC,

Cross-Defendants.

Received January 26, 2001

ORDER

MOORE, J.

For the reasons set forth in the accompanying memorandum of even date, it is hereby

ORDERED that the Emergency Motion to Reconsider Confirmation of Sale to Atlantic Steel and Albert George is DENIED; it is further

ORDERED that the Motion to Vacate Judgment, Sale and Confirmation of Sale is DENIED, it is further

ORDERED that the Motion to File Notice of Appeal Out of Time is DENIED, and it is further

ORDERED that, in so far as each of the motions above were filed in multiple copies on separate occasions, such duplicate notions[4] are DENIED.

ENTERED this 25, day of January, 2001.
FOR THE COURT: Thomas K. Moore District Judge

ATTEST: WILFREDO MORALES
Clerk of the Court
By:
Deputy Clerk

Copies to:
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Albert George (4 Kronprindsens Gade, St. Thomas)

Footnotes
4 See Docket Nos. 107, 110, 111, 113, 114, 115, 116.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-2321 and 01-1352

MERRILL LYNCH CREDIT CORPORATION

v.

JAMES KING; OMAH KING;
ATLANTIC STEEL CORPORATION;
V.I. BUREAU OF INTERNATIONAL REVENUE;
BUCCANEER MALL ASSOCIATES, INC.
James King: Omah King, Appellants
(D.C. Civ. No. 95-cv-00053)

Present: BECKER, Chief Judge, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO ROTH, RENDELL, BARRY AMBRO, FUENTES, and COWEN*, Circuit Judges.

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is DENIED.

Footnotes

* As to panel rehearing only.